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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

BRIGHAM YOUNG UNIVERSITY,
PETITIONER AND APPELLANT,

VS.

EDITH CANNON LILLYWHITE,
RESPONDENT AND APPELLEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF OF RESPONDENT AND APPELLEE

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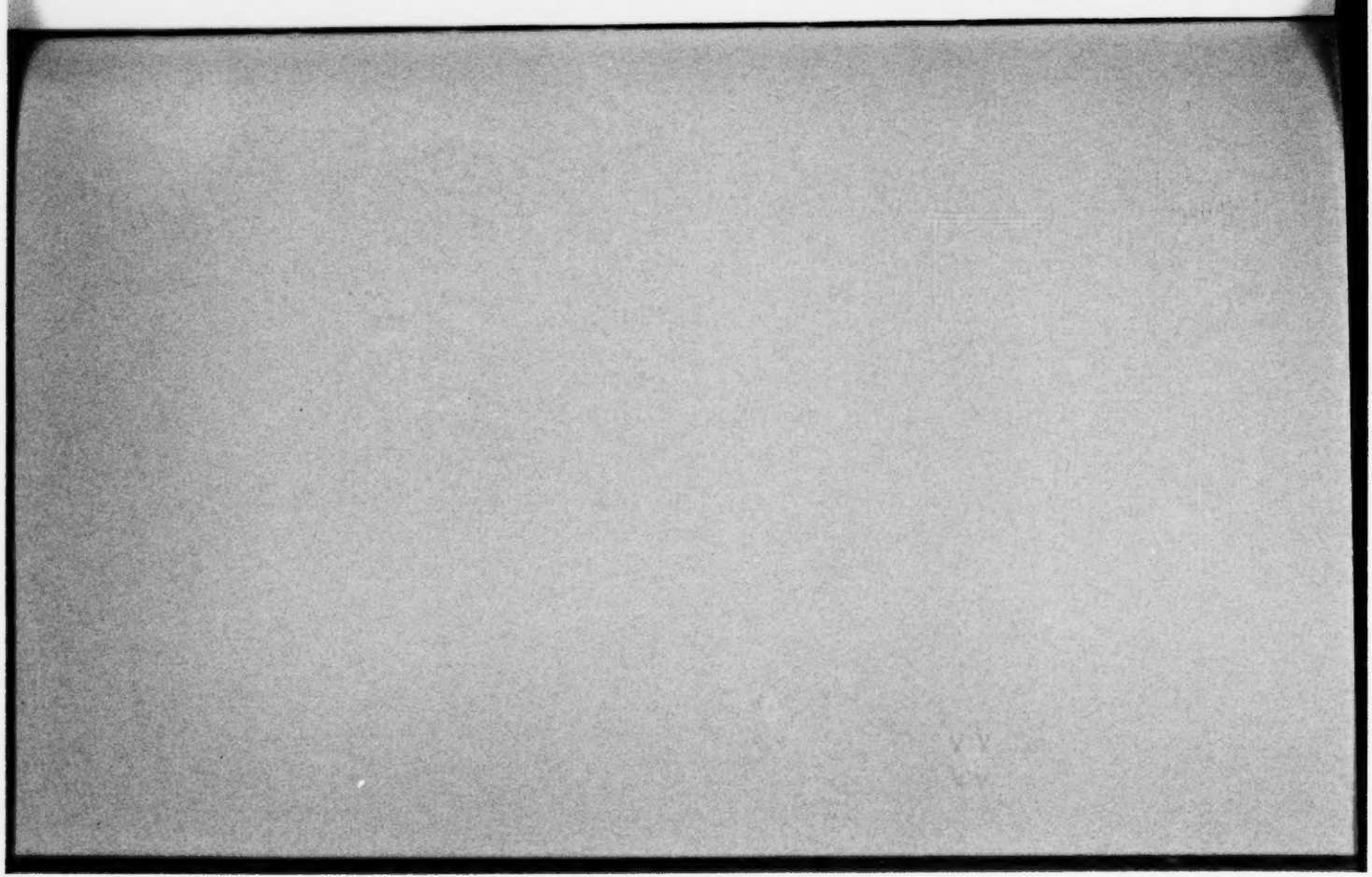

SUBJECT INDEX

	Page
SUMMARY SUPPLEMENTAL STATEMENT	1
BASIS OF COURT'S JURISDICTION	3
QUESTIONS PRESENTED	4
REASONS RELIED UPON FOR ALLOWANCE OF WRIT	11
CONCLUSION	12

AUTHORITIES CITED

Ahern v. Livermore Union High School, (Cal. Sup. Ct.) 208 Cal. 770, 284 Pac. 1105	7
Alabama Baptist Hospital Board v. Carter, 226 Ala. 109, 145 So. 443	10
Bellman v. San Francisco High School, (Cal. Sup. Ct.) 11 Cal. (2d) 576, 81 Pac. (2d) 894	8
Boehmer v. Pennsylvania R. R. Company, 252 U. S. 496	12
Chicago, Great Western Ry. Co. v. McDonough, (8th C. C. A.) 161 Fed. 657	6
Chicago, Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., (8th C. C. A.) 176 Fed. 237	5
Chicago Junction R. R. Company v. King. 222 U. S. 222, 56 L. Ed. 173	12
Dolan v. Boott Cotton Mills, (Mass.) 70 N. E. 1025	6
England v. Hospital of the Good Samaritan, (Cal. Sup. Ct.) 14 Cal. (2d) 791, 97 Pac. (2d) 813	10
Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188	3
Geiger v. Simpson Methodist Episcopal Church of Minneapolis, 174 Minn. 389, 219 N. W. 463	10
General Talking Picture Corporation v. Western Electric Company, 304 U. S. 175, 82 L. Ed. 1273, 58 S. Ct. 849	12
Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n, 32 Utah 46, 88 Pac. 691	10
Glaven v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675	10
Groesbeck v. Lake Side Printing Co., 55 Utah 335, 186 Pac. 103	7
Henry v. Garden Grove High School, 119 Cal. A. 638, 7 Pac. (2d) 192	7
Hewett v. Women's Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190	10
Hillier v. The Governors of St. Bartholomew's Hospital, 9 B. R. C. 1, 9, 78 L. H. K. B. (N. S.) 9558, 101 L. T. N. S. 368	11
Holland v. Oregon Short Line Railroad Co., 26 Utah 209, 72 Pac. 940	7
John Potter, et al. v. Dr. W. H. Groves Latter-Day Saints Hospital	9
LaVere v. Smith's Falls Public Hospital, 35 Ont. L. Rep. 98	11

Page

Mary Fritz, et al. v. Western Union, et al.,
25 Utah 263, 71 Pac. 209 5

Mastrangelo v. West Side Union High School Dist.,
2 Cal. (2d) 540, 29 Pac. (2d) 885, 42 Pac. (2d) 634 7

McGar v. National Providence Worsted Mills,
22 R. I. 347, 47 Atl. 1092 5

Mulliner v. Evangelischer Dia. of Minn. District,
144 Minn. 392, 175 N. W. 699 10

Northam, et al. v. Boston & Montana Consolidated Co.,
(9th C. C. A.) 190 Fed. 722 5

Ohio Copper Mining Co. v. Hutchings, et al.,
(8th C. C. A.) 172 Fed. 201 5

Parrish v. Clark, 107 Fla. 598, 145 So. 848 10
Perrin v. Union Pacific Railroad Co., 59 Utah 1, 201 Pac. 405..... 8, 9
Peterson v. Richards, 73 Utah 59, 272 Pac. 229 8

Putnam Memorial Hospital v. Allen,
(2nd C. C. A.) 34 Fed. (2d) 927 11

Roach v. Los Angeles, Etc. R. Co., 74 Utah 545, 280 Pac. 1053..... 9

Ruhlin v. New York Life Insurance Company,
304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290 12

Sessions v. Thomas D. Dee Memorial Hospital Ass'n,
94 Utah 460, 78 Pac. (2d) 645 ..... 4, 9, 10
Shawnee v. Roush, 101 Okla. 60, 223 Pac. 354 10

Sheehan v. North Country Community Hospital,
273 N. Y. 163, 7 N. E. (2d) 28 10

Silva v. Providence Hospital of Oakland,
14 Cal. (2d) 762, 97 Pac. (2d) 798 10

Silver Falls Timber Co. v. Eastern & Western Lumber Co.,
149 Ore. 126, 40 Pac. (2d) 703 5

Sisters of the Sorrowful Mother v. Zeidler,
183 Okla. 454, 82 Pac. (2d) 996 10

Southern Power Co. v. North Carolina Public Service Co.,
263 U. S. 508, 68 L. Ed. 413 12
Spackman v. Benefit Association, 97 Utah 91, 89 Pac. (2d) 490..... 8

Spiking v. Consolidated Ry. & Power Co.,
33 Utah 313, 93 Pac. 838 5

Sporsem v. First Nat. Bank of Poulsbo,
133 Wash. 199, 233 Pac. 641 5

Stone & Webster Engineering Co. v. Melovich,
(9th C. C. A.) 202 Fed. 438 5

Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4 10

United States of America v. Johnston,
268 U. S. 220, 69 L. Ed. 925 12

Ward v. Denver & R. G. W. R. Co., 96 Utah 564, 85 Pac. (2d) 837 9
Welch v. Frisbie Memorial Hospital, (N. H.) 9 Atl. (2d) 761 10

TEXTS:

20 R. C. L., Section 95, page 109 8

Wigmore, Vol. 2, Section 461, Pages 488-90 5

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EDITH CANNON LILLYWHITE,
RESPONDENT AND APPELLEE.

BRIEF OF RESPONDENT AND APPELLEE

SUMMARY SUPPLEMENTAL STATEMENT.

The petitioner, Brigham Young University, has set forth in its petition a statement of facts and respondent, therefore, sets forth herein a supplementary statement only.

At the time Edith Cannon Lillywhite suffered the loss of her eye through the explosion, on account of which this action was prosecuted, she was a freshman student with no high school chemistry experience, and the laboratory period during which the explosion occurred was the first in which respondent and her two freshman girl companions had used chemical properties.

Experiments 10 and 11, on which the girls were working, were companion experiments involving the use of chemical

properties, including lead dioxide, mercuric oxide, iron oxide, manganese dioxide, oxone or sodium peroxide, hydrogen peroxide, potassium chlorate, potassium permanganate and sulphuric acid. Ferric oxide was provided to be used as a substitute for manganese dioxide and was furnished the students in this case. It is a reddish rust color. Manganese dioxide is a black powder. Red phosphorus or iron phosphorus is also reddish in laboratory form, and the use of red phosphorus or phosphorus dioxide in place of ferric oxide and in combination with potassium chlorate is very dangerous. An experienced chemical instructor could, by supervisory observation, determine the difference between sulphur or phosphorus and ferric oxide when mixed with potassium chlorate. With ferric oxide and red phosphorus or sulphur furnished the students, and the three working together at one desk with these ingredients, it would be and was easy to make a mistake in using red phosphorus or sulphur instead of ferric oxide.

Petitioner's statement that five laboratory periods had been previously attended by the three girls is somewhat misleading as these periods were not devoted to the performance of exercises involving chemical properties, but only to familiarizing the students with apparatus, and the explosion actually occurred during the very first laboratory period at which chemical ingredients were mixed.

No instructor was present during the performance of Exercise 11 as Dr. Johannesen had left the three girls to proceed with the experiment without any supervision. Afton K. Anderson, one of the girls, testified that she did not recall any warnings by Dr. Johannesen concerning the chemicals or that he wanted to see the experiment performed. No instructor inspected the equipment or the chemical properties, and she did not remember that any warning had been given not to proceed until the equipment and materials had been checked; that if any warning had been given, she thought they would have waited as such would not have missed her recollection. She was quite sure Dr. Johannesen did not say anything before he left the laboratory about waiting until his return, but left after telling them to get their equipment and set up and do No. 11.

Instructor Harvey Howell and Dr. Elton L. Quinn pointed out not only the dangers involved in the performance of this particular experiment, but the fact that elementary chemistry students in other schools are not permitted to perform such experiments except working singly or in pairs

under the careful supervision of instructors; that only when necessary were students permitted to work even in pairs, and in such instances one set up the equipment and the other handled the chemical properties to avoid confusing or wrongly mixing ingredients by two or more students handling them.

The jury, in addition to returning a general verdict against petitioner, consistently answered special interrogatories by finding (1) that plaintiff was not negligent; (2) that defendant was negligent in that Dr. Johannesen left the room; (3) that Dr. Johannesen was negligent in not remaining in the laboratory and overlooking the activities of the young women; (4) that Dr. Johannesen did not instruct the girls to proceed with the experiment "to its end;" (5) that he did not instruct them to await his return before completing the experiment; (6) that claimant was not guilty of negligence proximately contributing to the explosion; (7) that one of the girls negligently mixed the wrong chemicals; (8) that the proximate cause of the accident was not the mistake of plaintiff or her girl companions; and (9) that the mistake was the result of the failure of Dr. Johannesen to use reasonable and ordinary care in supervising the three girls.

It is clear from the record that the jury was justified in concluding that the proximate cause of the explosion was the negligence of the Brigham Young University, through Dr. Johannesen, in permitting and directing three inexperienced freshman girls to work together in the performance of a dangerous experiment, unsupervised and substantially uninstructed, while he was out of the laboratory.

BASIS OF COURT'S JURISDICTION.

In seeking a review, petitioner urges that the Tenth Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions, and that this case presents an important public question for determination by this Court.

Respondent cannot appreciate either the importance of the question or that its determination by this Court will affect the rule of law either in the State of Utah or any other state, as the Federal Courts, since the case of *Erie Railroad Company vs. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, are bound to apply the state law.

The question of whether the Brigham Young University is liable for the negligence of its instructor under the facts involved in this case has been passed upon by the Honorable Tillman D. Johnson, District Judge, for fifty years familiar with Utah law, and by the Tenth Circuit Court of Appeals. Both these Courts had before them the entire record in the controlling Utah case of *Sessions vs. Thomas D. Dee Memorial Hospital Association,* including the transcript of record, briefs and the Amicus Curiæ petition and brief on rehearing filed by Brigham Young University and Dr. W. H. Groves Latter-Day Saints Hospital, wherein the Mormon Church sought a rehearing in the Sessions case, calling the Supreme Court's attention to this case, then pending, and the probable liability of the Brigham Young University to respondent under the decision in the Sessions case, which held that a charitable institution is legally responsible to a contract pay patient for the negligence of its employees.

In this case, respondent was admittedly a contract pay student and not attending under a scholarship or reduced tuition as a widow's daughter. She paid the full tuition of $75.00.

While it is now the settled rule in Utah that eleemosynary institutions are liable to contract pay patients or students, nevertheless, this Court could not by any decision change or modify the Utah rule or have any effect in determining the rights of other claimants in either the state or the federal courts.

It is respectfully suggested that in view that the United States District Court for Utah and the United States Circuit Court of Appeals have interpreted the Utah law with all possible assistance, this Court should conclude that petitioner has fully presented this question to appropriate tribunals and now seeks nothing more than a new trial as evidenced by its argument and authorities on questions of evidence, negligence, contributory negligence, proximate cause, and jury instructions.

QUESTIONS PRESENTED.

Respondent will consider petitioner's questions in the order set forth in its Petition and Brief.

1. It is urged that the Circuit Court of Appeals erred in sustaining the admission of the testimony of Instructor Harvey Howell and Dr. Elton L. Quinn. The Circuit Court

of Appeals effectively disposed of this question in its opinion reported in 118 Federal Reporter, Second Series, page 836. It is there pointed out that this evidence was not admitted for the purpose of establishing a standard of care or duty on the part of petitioner by which petitioner's liability should be determined, but that the same should be considered by the jury with all other evidence in determining whether petitioner exercised that care required of an ordinarily prudent person. The trial court clearly called the jury's attention to the limited purpose of the evidence, that is to enable it to know how many different ways laboratory classes might be conducted, and it would then be left entirely to the jury to determine whether the defendant was or was not negligent.

This evidence was properly admitted pursuant to appropriate instructions.

Wigmore, Volume 2, Section 461, pages 488-90, points out the distinction between evidence received to establish a standard of conduct and that received properly, with an express caution that it is merely evidential. This is precisely the rule applied by the trial court and sustained by Utah and other authorities.

Silver Falls Timber Co. v. Eastern & Western Lumber Co., 149 Ore. 126, 40 Pac. (2d) 703;

Mary Fritz, et al. v. Western Union, et al., 25 Utah 263, 71 Pac. 209;

Spiking v. Consolidated Ry. & Power Company, 33 Utah 313, 93 Pac. 838;

Ohio Copper Mining Co. v. Hutchings, et al., (8th, C. C. A.) 172 Fed. 201;

Chicago, Great Western Ry. Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., (8th C. C. A.) 176 Fed. 237;

Northam, et al. v. Boston & Montana Consolidated Co., (9th C. C. A.) 190 Fed. 722;

Stone & Webster Engineering Co. v. Melovich, (9th C. C. A.) 202 Fed. 438;

Sporsem v. First Nat. Bank of Poulsbo, 133 Wash. 199, 233 Pac. 641;

McGar v. National Providence Worsted Mills, 22 R. I. 347, 47 Atl. 1092;

Dolan v. Boott Cotton Mills,
(Mass.) 70 N. E. 1025;

Chicago, Great Western Ry. Co. v. McDonough,
(8th C. C. A.) 161 Fed. 657.

2. It is urged that the Circuit Court of Appeals erred in sustaining the trial court in instructing the jury concerning the practices in other universities. Dr. Quinn of the University of Utah, and formerly of the New Mexico State School of Mines and Princeton University, was familiar with the practices in such schools. The trial court's instructions clearly pointed out that the fact that petitioner may not have conducted its laboratories as other laboratories were conducted did not establish negligence. It said:

> "I want to find out how many different ways it could be done. Then the question ultimately would be if your man did a little differently from this witness or some other witness, whether the jury would say one was negligent and the other was not, or both were negligent, or both were right."

The jury was further instructed that

> "The practice in other universities in respect to this or similar experiments may be considered by you in determining whether or not Dr. Johannesen exercised due and reasonable care in this particular instance. Such practice would not be conclusive, but it is a matter under all the circumstances of the case that you may take into consideration."

It was properly left for the jury to determine whether the manner of petitioner's operation of its laboratory on the particular occasion was reasonable and prudent or negligent.

(See authorities under Question 1.)

3. The petitioner claims that the Circuit Court of Appeals erred in sustaining the trial court in denying its motion for a directed verdict as (a) respondent failed to prove negligence; (b) respondent failed to prove petitioner's negligence proximately caused the accident; (c) that the evidence established respondent's contributory negligence; (d) that respondent assumed the dangers incident to the

course; and (e) that petitioner is exempt from liability as an eleemosynary institution.

By answering points (a) to (e) inclusive, under Question 3, Questions 4 and 5, on page 10 of the Petition, will be necessarily disposed of.

(a) Respondent established that the explosion occurred due to petitioner permitting three inexperienced freshman girl students to proceed with the performance of the experiment without personal instruction or supervision by any instructor or supervisor in the laboratory. Under well recognized Utah law, the questions of negligence, contributory negligence and proximate cause were questions of fact to be determined by the jury where the evidence was in conflict or dispute or even undisputed, if reasonable minds might reach different conclusions or inferences from the facts.

In *Groesbeck v. Lake Side Printing Co.*, 55 Utah 335, 186 Pac. 103, an inexperienced boy employee reached into the press feeder for a piece of paper and injured his hand. It was claimed that the boy was contributorily negligent in placing his hand in the press feeder. A verdict against the printing company was sustained, the Supreme Court of Utah saying:

> "The evidence must be considered and applied most favorable to the plaintiff's cause of action * * * the question of whether the immature mind should be required to suffer the consequences of his actions in view of a particular train of circumstances, always presents a more or less delicate question which should not be too hastily determined by the court as a matter of law. We are of the opinion that whether under all the circumstances, it was negligence not to instruct or to warn the plaintiff, was also a question of fact for the jury and not one of law for the court."

Holland v. Oregon Short Line Railroad Co., 26 Utah 209, 72 Pac. 940;

Mastrangelo v. West Side Union High School Dist., 2 Cal. (2d) 540, 29 Pac. (2d) 885, 42 Pac. (2d) 634;

Ahern v. Livermore Union High School, (Cal. Sup. Ct.) 208 Cal. 770, 284 Pac. 1105;

Henry v. Garden Grove High School, 119 Cal. A. 638, 7 Pac. (2d) 192;

Bellman v. San Francisco High School,
(Cal. Sup. Ct.) 11 Cal. (2d) 576, 81 Pac. (2d) 894;

Perrin v. Union Pacific Railroad Co.,
59 Utah 1, 201 Pac. 405;

Peterson v. Richards,
73 Utah 59, 272 Pac. 229;

Spackman v. Benefit Association,
97 Utah 91, 89 Pac. (2d) 490.

(b) The law of Utah is well settled to the effect that proximate cause is a question of fact for the jury. It cannot be successfully argued that a failure of warnings, instructions and supervision, and the careless permitting of three young girls to proceed under the circumstances disclosed by the evidence, was not the proximate cause of the mixing of wrong chemical ingredients and thus the proximate cause of the explosion and resulting accident.

(c) There was no evidence that plaintiff was contributorily negligent, and the jury specifically found that she was not negligent; that neither her negligence nor that of the other girls was the proximate cause of the explosion, but on the contrary that the negligence of Dr. Johannesen was the proximate cause. Respondent did not participate in mixing the chemical properties. Even if she had herself mixed them, her doing so under the circumstances would be excusable because of the failure of the petitioner to take proper precautions to guard against a danger which its instructor should have known and, under the circumstances, guarded against.

(d) Respondent, as an inexperienced student, assumed no risks, at least none that petitioner should have guarded against. The doctrine of assumed risk has never been recognized in Utah except in master and servant cases. As stated in *20 R. C. L., Section 95, page 109:*

> "It frequently is asserted that the doctrine of assumption of risk has no application except between master and servant."

Even in master and servant cases, the servant does not assume risks or dangers resulting from the master's negli-

gence, and the only related rule which could apply in this case is the rule of contributory negligence.

Ward v. Denver & R. G. W. R. Co.,
96 Utah 564, 85 Pac. (2d) 837;

Roach v. Los Angeles, Etc., R. Co.,
74 Utah 545, 280 Pac. 1053;

Perrin v. Union Pacific R. Co.,
59 Utah 1, 201 Pac. 405.

(e) Petitioner is not exempt from liability to a contract paying student and it is questionable, under existing Utah law, that exemption exists even in charity cases.

Since the recent decision in *Sessions v. Thomas D. Dee Memorial Hospital Association*, 94 Utah 460, 78 Pac. (2d) 645, the trial courts have held that charitable or eleemosynary institutions are liable to contract patients or students and have submitted issues of negligence to the jury. In *John Potter et al. v. Dr. W. H. Groves, Latter-Day Saints Hospital*, deceased paid nothing, but was sent to the hospital by the religious ward in which she lived. The standard service charge for the services rendered was $55.30, on account of which the ward contributed only $10.00 without designation of application of such payment to the particular account. While it was held there was no negligence, the question of liability was submitted to the jury, and the Dr. W. H. Groves Latter-Day Saints Hospital, in its brief, pointed out that in the Sessions case it was held "that a hospital, in the case of a pay patient was liable for the death of the patient resulting from the negligent act of one of the hospital nurses."

In the Sessions case, the Supreme Court of Utah disposed of the eleemosynary or charitable purpose of the hospital and its liability resulting from the negligence of its employees by clearly holding that no question of public policy was involved. It was stated that while the Legislature of Utah had exempted charitable institutions from tax liability, the Legislature had not seen fit to determine that public policy dictated that such institutions should be exempt from legal liability in cases where a charge was made for services rendered and a contract relationship thereby arose. A thorough analysis of the decision in the Sessions case, with the record and authorities relied upon, including the Amicus Curiæ brief on rehearing in behalf of Brigham Young University, clearly establish that in Utah though an insti-

tution is legally and actually eleemosynary or charitable, it is not exempt from liability on account of the tort of its agent where the claimant bears a contract relationship to it and pays the required compensation. Such is not only the Utah law, but that of a number of other jurisdictions, and in California public schools supported by the taxpayers are similarly responsible.

Sessions v. Thomas D. Dee Memorial Hospital Ass'n, 94 Utah 460, 78 Pac. (2d) 645;

Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n, 32 Utah 46, 88 Pac. 691;

Silva v. Providence Hospital of Oakland, 14 Cal. (2d) 762, 97 Pac. (2d) 798;

England v. Hospital of the Good Samaritan, (Cal. Sup. Ct.) 14 Cal. (2d) 791, 97 Pac. (2d) 813;

Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4;

Alabama Baptist Hospital Board v. Carter, 226 Ala. 109, 145 So. 443;

Mulliner v. Evangelischer Dia. of Minn. District, 144 Minn. 392, 175 N. W. 699;

Geiger v. Simpson Methodist Episcopal Church of Minneapolis, 174 Minn. 389, 219 N. W. 463;

Hewett v. Women's Hospital Aid Ass'n, 73 N. H. 556, 64 Atl. 190;

Welch v. Frisbie Memorial Hospital, (N. H.) 9 Atl. (2d) 761;

Shawnee v. Roush, 101 Okla. 60, 223 Pac. 354;

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Hillier v. The Governors of St. Bartholomew's Hospital, 9 B. R. C. 1, 9, 78 L. H. K. B. (N. S.) 9558, 101 L. T. N. S. 368;

LaVere v. Smith's Falls Public Hospital, 35 Ont. L. Rep. 98;

Putnam Memorial Hospital v. Allen, (2nd C. C. A.) 34 Fed. (2d) 927.

4. Petitioner's Motion for Judgment Notwithstanding the Verdict was based particularly upon Point (e) under Point 3 above. It has already been noted that the trial court and the Circuit Court of Appeals of the Tenth Circuit held that the law of Utah as established by the Sessions case, determined petitioner's liability.

5. The ruling of the Circuit Court of Appeals in sustaining the trial court's denial of petitioner's Motion for a New Trial is consistent with its ruling on the Motion for a Judgment Notwithstanding the Verdict, and the submission of the case to the jury.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

Petitioner urges that this Court should say whether or not, under the law of Utah and other state and federal cases, the decision of the Circuit Court of Appeals should be allowed to stand and establish the law. We have pointed out that a decision by this Honorable Court cannot establish the law, and certainly decisions from other states or the United States Supreme Court or other federal courts cannot establish the law of Utah.

If a decision by this Court cannot affect the law in Utah, or any other state, no public interest is involved and nothing could be accomplished except that this Court could perhaps misinterpret or misapply the law of Utah, and in this particular instance defeat respondent's rights.

An examination of the petition for the Writ of Certiorari and Brief in support thereof conclusively establishes that petitioner, having been defeated by the trial court and by the Circuit Court of Appeals, now asks this Court to afford it another hearing. This Court has on numerous occasions declared that it will not undertake to review questions of

evidence, negligence and errors of law arising during the trial.

General Talking Picture Corporation v. Western Electric Company, 304 U. S. 175, 82 L. Ed. 1273, 58 Supreme Court 849;

Boehmer v. Pennsylvania R. R. Company, 252 U. S. 496;

Chicago Junction R. R. Company v. King, 222 U. S. 222, 56 L. Ed. 173;

Ruhlin v. New York Life Insurance Company, 304 U. S. 202, 58 S. Ct. 860, 82 L. Ed. 1290;

Southern Power Co. v. North Carolina Public Service Company, 263 U. S. 508, 68 L. Ed. 413;

United States of America v. Johnston, 268 U. S. 220, 69 L. Ed. 925.

CONCLUSION.

Respondent respectfully submits that petitioner has presented no case calling for the exercise by this Court of supervisory powers. Its principal contention is that as a charitable institution, with an expenditure by the Mormon Church of approximately $6,000,000.00 in its construction and maintenance, it should be relieved from a judgment of $3500.00 on account of the loss of an eye suffered by an eighteen year old girl. Respondent fails to appreciate why a rule of non-liability based upon a claim of charitable character should be applied in the absence of unquestionable sustaining state authority. A decision by this Court would have no supervisory or general public effect other than perhaps to put a premium on negligence. Respondent respectfully submits that the petition should be denied.

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